IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

WEDNESDAY, THE 26TH SEPTEMBER 2007 / 4TH ASWINA 1929

WP(C).No. 25756 of 2007(N)

LAR.314/1995 of ADDL.SUB COURT,PARAVUR

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PETITIONER:

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1. SMT.BHAVANI, D/O.PALLIPADAN,
   PERUMKULAM, NAYATHODU.

2. SMT.KARTHU, D/O.PALLIPADAN,
   PERUMKULAM, NAYATHODU.

3. SMT.LEELA, D/O.PALLIPADAN,
   PERUMKULAM, NAYATHODU.

4. KAUSALYA, D/O.PALLIPADAN,
   PERUMKULAM, NAYATHODU.

5. SMT.THANKAMANI, W/O.PALLIPADAN,
   PERUMKULAM, NAYATHODU.

6. SMT.AMMINI, D/O.PALLIPADAN,
   PERUMKULAM, NAYATHODU.

BY ADV. SRI.K.VINOD CHANDRAN
SRI.V.N.SUNIL KUMAR
SRI.PREMJIT NAGENDRAN

RESPONDENTS:

STATE OF KERALA,
REPRESENTED BY GOVERNMENT PLEADER,
HIGH COURT OF KERALA.

BY GOVT. PLEADER SRI.L.G.SURESH BABU.

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 26/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.PADMANABHAN NAIR, J.

W.P.(C) No.25756 OF 2007

Dated this the 26th September, 2007.

J U D G M E N T

Heard. Admitted. Learned Government Pleader takes notice for the respondent. The writ petition itself is heard and disposed of as agreed to by the counsel.

2. An area of 4.84 Ares of land comprised in Survey No.250/15 and 350/16 of Angamally Village was acquired for a public purpose. The land was in the joint possession of father and mother of the petitioners. The mother died. The Land Acquisition Officer has passed awards No.563 of 1997 and 564 of 1997 for an amount of Rs.43,591/= and Rs.1,02,482/= respectively. Petitioners who are the daughters of Pallipadan Perumkulam filed a petition before the Land Acquisition Officer claiming compensation, on the ground that their father was missing and his whereabouts were not known from 12.5.1996 onwards. It was further averred that the matter was published in a vernacular news paper and based on the statement given by the daughters, a criminal case was also registered for man missing. The Land Acquisition Officer, did not disburse the amount.

But he deposited the amount in Additional Sub Court, North Paravur, under Section 31(2) of the Land Acquisition Act, for considering the right of the claimints to get the amounts awarded. Before the Sub Court also, petitioners claimed title over the compensation amount, on the ground that the property was owned by Pallipadan, he was missing, his whereabouts were not known from 12.5.1996 onwards, he may be presumed to be dead, and the amount shall be disbursed to the petitioners, who are his legal heirs.

3. The State did not file any written statement denying the claim put forward by the petitioners in L.A.R. The learned Subordinate Judge, after taking evidence, found that the amount cannot be disbursed to the claimants. It was held that they will have to file a suit for declaration that their father is presumed to be dead, and on production of such a judgment, they can claim the amount. On that finding, the claim for the amount under deposit was rejected. Challenging that decision, this writ petition is filed.

4. When the writ petition came up for hearing, the Registry has raised an objection that the writ petition is not maintainable. In **Krishna Pillai v. State of Kerala** (2007 (2) KLT

588), wherein, this Court has held that when a decision challenged is illegal, party cannot be compelled to pay huge amount as court fee and file an appeal, and such an illegality can be rectified by invoking the powers under Article 227 of the Constitution of India. In this case, the finding of the court below refusing to adjudicate the right of the petitioners to get the amount, based on the presumption available under Section 108 of the Evidence Act, will amounts to failure to exercise the jurisdiction vested in the Court. Hence, the writ petition was numbered.

5. Now I shall consider whether the direction of the Land Acquisition Reference Court to the petitioners to approach the Civil Court for a declaration is valid. Respondents had not denied the averment that Pallipadan, S/o. Palakkadan, is missing from 12.5.1996 and his whereabouts are not known. The claim of the petitioners were rejected on the sole ground that they did not produce any document of title. The question arising for consideration is whether in order to get the compensation amount, the petitioners are bound to file a separate suit for declaration that there father must be declared as a dead person. As per Section 107 of the Indian Evidence Act, 1872, When the question is whether a man is alive or dead, and it is

shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it. But to that general section, a proviso or an explanation is added by way of Section 108 of the Indian Evidence Act, which reads as follows:-

> "**108. Burden of proof that person is alive who has not been heard of for seven years:-** (Provided that when) the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it."

6. The learned Subordinate Judge failed to note that Section 108 of the Indian Evidence Act does not create any substantive right to any party. It only provides that when there is a dispute as to whether a person is dead or alive, the relatives of that particular person can adduce evidence. So, it is only a Rule of Evidence.

7. In **L.I.C. Of India v. Anuradha** (2004 (2) KLT 351 (SC), the Apex Court has held as follows:-

> " The law as to presumption of death remains the same whether in Common Law of England or in the statutory provisions contained in Ss.107 and 108 of the Indian Evidence Act 1872.

> In the scheme of Evidence Act, though Ss.107 and 108 are drafted as two Sections, in effect, S.108 is an exception to the rule enacted in S.107."

It was further held that the presumption under Section 108 of the Evidence Act is confined only to presuming the factum of death of the person who's life or death is in issue. If in a proceedings, a question as to whether a particular person is dead or alive arises, law gives an opportunity to the parties to prove that that particular person is dead. No independent suit for such a declaration can be made, especially, in view of the provisions of Section 34 of the Specific Relief Act. In this particular case, the purpose of getting a declaration that Pallipadan is dead, on account of the fact that petitioners want to collect the amount in deposit. So, according to the petitioners, their father must be presumed to be dead. The question whether their father is dead or alive is the point arising for consideration in this proceedings.

8. The learned Subordinate Judge failed to note that for this purpose alone, the parties cannot be compelled to file a suit. That is a matter to be decided in this proceeding itself. The learned Subordinate Judge has not considered the matter on its merits. So,

the judgment and decree passed by the court below are liable to be interfered with, by exercise of the powers conferred on this Court under Article 227 of the Constitution of India.

9. In the result, this writ petition is allowed. The decree and judgment passed by the learned Subordinate Court, North Paravur, in L.A.R.No. 18/1999 are hereby set aside. The learned Subordinate Judge is directed to take L.A.R.No.18/99 back to its file and dispose of the same afresh, in accordance with law.

Being a very old matter, the learned Subordinate Judge shall dispose of the matter, within three months from the date of first appearance of parties.

K.PADMANABHAN NAIR,
JUDGE

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